

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 461808
Issued to: Ivon Wayne LUDLUM

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2276

Ivon Wayne LUDLUM

This review has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 4 October 1977, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, suspended Appellant's license for one month on twelve months' probation upon finding him guilty of negligence after a hearing held at Wilmington, North Carolina. The specification found proved alleges that while serving as pilot of M/V TORRENT under authority of the license above captioned, on or about 23 August 1976, Appellant wrongfully failed to sound a danger signal upon meeting SS EASTERN SUN near buoy 50, on the Cape Fear River, thereby contributing to a collision between his vessel and SS EASTERN SUN.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of two witnesses, the deposition of another witness, and several documents.

In defense, Appellant offered in evidence his own testimony and that of three other witnesses.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order suspending Appellant's license for a period of one month on twelve months' probation.

The entire decision was served on 5 October 1977. Appeal was timely filed and perfected on 8 April 1978.

FINDINGS OF FACT

On 23 August 1976, Appellant was serving as pilot on board M/V TORRENT and acting under authority of his license. (Because of the

disposition to be made of this case, no further findings beyond the jurisdictional one will be made.)

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the findings are not supported by substantial evidence, that a danger signal was not required under the conditions, and that the lack of a danger signal did not contribute to the collision.

APPEARANCE: Rountree and Newton, Wilmington, N. C., by John Richard Newton, Esp.

OPINION

I

The central issue raised on the record in this case is whether a "danger signal" must be sounded in fog under the Inland Rules when conditions otherwise might appear to be the same as those which would require the sounding of a danger signal on clear visibility. However, my disposition of this case does not require a detailed explanation of the law applicable to danger signals or reduced visibility.

Review of the transcript of proceedings in this case reveals that some difficulties arose in the recording of the hearing. The Investigating Officer examined Captain Billie Eubanks, the Operator of the Tug TORRENT at the time Appellant was piloting TORRENT, at some length. Captain Eubanks' testimony was of great significance since he stood, so to speak, at the shoulder of the person charged. In the record, at page 99 line 24, the Investigating Officer addressed a question to Captain Eubanks related to Appellant's intentions at a certain time. Instead of an answer, a parenthetical appears in the last line, "(Blank in the tape)." Page 100, line 1 is equally cryptic: "(A long blank in the tape)." Thereafter the transcript continues, but counsel for Appellant is the interlocutor, not the Investigating Officer. It is readily apparent that the cross examination by counsel did not begin on page 100 with the question recited there. The tenor of counsel's question and the chronology of events make it clear that a substantial portion of the cross examination is missing from the record.

The regulations governing these proceedings require "... a complete transcript of the hearing and any material received in support of the appeal [to be sent] to the Commandant." 46 CFR 5.30-1(d). The Administrative Procedure Act also requires appellant agency review to consider the record as a whole. 5 U. S. C. 554-57;

see also Appeal Decision No. 2004 (APA applies to R. S. 4450 proceedings). Omissions from a record of hearing of a substantial nature, which relate to significant matters in the proceeding, effectively preclude meaningful review. If the omissions are minor in nature or related to preliminary matters a different result might attend. See generally Appeal Decision No. 1933 (clerical defects not prejudicial); Appeal Decision No. 1916 (lack of an adequate record precludes appellate review); Appeal Decision No. 2157 (no decipherable record available); Appeal Decision No. 2168 (extensive material changes to text renders transcript suspect).

CONCLUSION

The central issue of whether a "danger signal" must be sounded in fog under Inland Rules has been cured by subsequent statutory modification and the passage of time has rendered further proceedings unlikely to remedy the other defects. Accordingly, the Charge and Specification should be dismissed and the order vacated.

ORDER

The order of the Administrative Law Judge dated at Norfolk, Virginia, on 4 October 1977, is VACATED. The charges are DISMISSED.

B. L. STABILE
Vice Admiral, U. S. Coast Guard
VICE COMMANDANT

Signed at Washington, D. C., this day of 1982.